No. 16,052

In the

United States Court of Appeals

For the Ninth Circuit

APACHE POWDER COMPANY, a corporation,
Appellant,

vs.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, formerly ASHTON BUILDING COMPANY, and MARDIAN CONSTRUCTION COMPANY, corporations engaged in Joint Venture as ASHTON-MARDIAN COMPANY; and THE TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

Appellees' Answering Brief

Appeal from the United States District Court for the District of Arizona

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JURISDICTION

Appellees accept appellant's statement of jurisdiction matters as correct.

STATEMENT OF THE CASE

Appellees respectfully submit that appellant has stated as facts matters which are either contrary to the evidence or upon which the evidence is conflicting and on which the trial court resolved the conflict adverse to appellant's contentions.

The history of the transaction between appellee, Ashton-Mardian Company, and the United States of America and The Travelers Indemnity Company and concerning the contract between Ashton-Mardian Company and Pioneer Constructors is substantially correct. Appellees however submit that the asserted agreement between Pioneer Constructors and Apache Powder Company was nothing more than an order which resulted in materials being furnished on open account.

Appellant's statement as to the facts surrounding the shipments made from June 13, 1956 until the latter part of November is correct.

As to appellant's statement in the last paragraph of page 5 of its brief, that the negotiations between Pioneer Constructors, Construction Materials Company and Ashton-Mardian Company during the latter part of November, 1956, was without notice or knowledge thereof by Apache Powder Company is literally true as of the time specified. However, Apache Powder Company received actual notice of the change, to-wit, that Construction Materials Company was on the job on December 4, 1956 (R 233, R 251, R 252); again on December 10, 1956 (R 165-166); and received constructive notice thereof on December 29th when a check was received signed by Construction Materials Company paying the current invoices only and not the old Pioneer Constructors' invoices (R 233-234). Appellant's statement that Ashton-Mardian Company required that the work proceed under the same management and with the same personnel and equipment as under the Pioneer Constructors' subcontract does not appear to be supported by any evidence. The testimony being that this was not a condition (R 132).

Appellees submit that appellant's statement in the second paragraph on page 6 that Apache Powder Company had no

notice or knowledge of the termination of the Pioneer Constructors' subcontract is not correct but as stated above said company had received actual notice on at least two occasions and constructive notice thereafter.

The subcontractor on the job after November 1, 1956, was at all times Construction Materials Company (R 149).

Appellant quotes at considerable length, on pages 9 to 12 of its brief, from the evidence regarding the telephone conversations on December 4th and December 10th. Some of this evidence is sufficient to establish that appellant was notified on those dates that Construction Materials Company was then on the job, while part of the evidence is to the contrary. There was therefore a conflict of evidence on this point. Appellees contend that the preponderance of the evidence is that such notice was given and such was found as a fact by the trial court.

As appellant analyzes the case, a brief statement of the case is as follows: Appellee, Ashton-Mardian Company, was general contractor on the construction job in question, while appellee, Travelers Indemnity Company, was its surety on the bond required by the Act of Congress known as the Miller Act. On March 30, 1956, the said Ashton-Mardian Company entered into a subcontract with Pioneer Constructors for the performance of certain work involved in said project. We believe that these facts are undisputed.

From June 13, 1956, to and including the 24th day of October, 1956, appellant furnished material to said Pioneer Constructors on open account (R 187-R 294). Thereafter, in November of 1956, it was agreed between appellee, Ashton-Mardian Company, Pioneer Constructors, and Construction Materials Company that Construction Materials Company would take over the uncompleted work as of November 1, 1956 (R 112, R 116-R 131). Construction Materials actually took over the job on November 1, 1956 (R 163).

Appellant continued delivering materials to the job during November and on December 4, 1956, was notified by telephone that future orders on this Ajo work should be billed to Construction Materials Company (R 252) and again on December 10, 1956, was advised that Construction Materials Company was doing the work and that powder should be billed to Construction Materials Company (R 166). The last material delivered by appellant to any customer or subcontractor on the Ajo job was on March 12, 1957.

Pioneer Constructors was and is indebted to appellant in the sum of $18,947.96, no part of which has been paid. Construction Materials Company paid for all of the powder and other materials furnished by appellant after November 1, 1956, the remittances showing that payment was being made on the invoices for materials furnished after November 1, (R 295) the first of said payments having been made on December 29, 1956.

The last material was delivered by appellant to Pioneer Constructors on October 24, 1956 (R 294). On March 19, 1957, or four months and twenty-six days after the delivery of said material appellant gave its oral notice to appellee of its claim, said notice being three months and fifteen days after December 4, 1956, the date on which appellant was first advised of the change, and three months and nine days after December 10, the date on which it was again advised, and it was not until April 25, 1957, that appellant gave written notice to appellee in a belated attempt to comply with the Miller Act.

QUESTIONS INVOLVED

Appellees submit that the questions involved in this appeal could be better stated as follows:

1. Under the Miller Act, what steps must a supplier of materials used on a government project take to have a cause of action against the prime contractor and its surety when the supplier has furnished supplies to two subcontractors, only one of which has defaulted in payment of its obligations, and when the supplier has no contractual relationship, either express or implied, with the prime contractor?

2. Is specific and unquestioned oral notice given by a supplier to the prime contractor of the supplier's claims against one defaulting subcontractor sufficient notice under the Miller Act provided such notice is given within 90 days after the delivery of the last of the materials to the subcontractor?

3. Was the oral notice in this case given within 90 days after the delivery of the last of the material to the defaulting subcontractor?

ANSWERS TO ARGUMENTS

The appellees will attempt to frame their answer to the appellant's arguments under the same categories and divisions as those chosen by the appellant. In doing this, however, appellees make the following pertinent statements of fact and law which are involved in many of the arguments made by appellant.

1. Appellant, Apache Powder Company, had direct contractual relationship with the subcontractor, Pioneer Constructors, but had no contractual relationship, either express or implied, with the contractor, appellee, Ashton-Mardian Company (R 73-74). This particular fact and conclusion of the lower court is not questioned by appellant.

2. So far as this appeal is concerned, this action is not one against a debtor of Apache Powder Company, appel-

lant, but is against a third party appellee, Ashton-Mardian Company, as prime contractor, under a procedure and right authorized solely by statute. The United States Supreme Court in the case of *United States, ex rel, Texas-Portland Cement Company v. D. C. McCord and National Surety Company of New York,* 233 U.S. 157; 34 S.Ct. 550; 58 L.Ed. 893, in speaking in a case involving the prior statute dealing with the same subject matter as the one involved herein stated:

> "The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

In the case of *United States to Use of Yarnell v. Southern Drafting Company, et al,* 251 F. 400 at 402, also dealing with the prior statute to the one involved herein, it is stated:

> "Where a new right is created by statute, unknown to the common law, and the mode in which it may be enforced is specifically provided, the prescribed mode measures the extent of the power, and the right can be enforced in no other manner."

See also *United States for the Use and Benefit of John Denie's Sons Co. v. Bass, et al,* C.C.A. 6th Cir., 1940, F.2d 965; *National Surety Corp. v. Wunderlich,* C.C.A. 6th Cir., 1940, 111 F2d 622. See also the case of *Bowden, et al. v. United States of America for the Use of Malloy,* C.C.A. 9th Cir., 1956, 239 F.2d 572, in which it is stated:

> "It cannot be doubted that one purpose of Congress in enacting the Miller Act was the protection of laborers and materialmen. But it is clear too, we think, from the mechanics provided in the Act for its operation and the

accomplishment of its purpose, that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor."

3. At no place in the Miller Act (40 U.S.C.A. 270b(a)) is any notice provided or required from the prime contractor to suppliers of his subcontractors even as to completion date of the project.

4. That from and after November 4, 1956, Construction Materials Company did in fact perform all labor on the Ajo job for which supplies from appellant were furnished and Pioneer Constructors did in fact cease to do any work on the job after October 31, 1956 (R 163-R 256).

5. That all materials furnished or supplied by appellant on the Ajo job after November 1, 1956 were paid for by Construction Materials Company prior to the notice from appellant to appellees dated April 25, 1957 (R 73-R 295).

6. All sales made by appellant to either Pioneer Constructors or Construction Materials Company for supplies used on the job in question were on an open account basis and not made pursuant to formal contract or exclusive agreement (R 218-219).

7. At no time prior to March 19, 1957, did the appellant, Apache Powder Company, have any direct detailed knowledge of any written contract existing between the appellees and either Pioneer Constructors or Construction Materials Company (R 218-219).

8. The lower court did *not* find that appellant, Apache Powder Company, was informed by a representative and employee of Construction Materials Company, Paul A. Swagerty, that Construction Materials Company, Construc-

tion Division, was a division of Pioneer Constructors (R 70-R 253).

For purposes of clarity, appellees set forth in its entirety the cross-examination of witness, Paul A. Swagerty, by Mr. Lester, attorney for appellant (R 253-254):

"Q. (By Mr. Lester): You have just told us that you didn't know what the exact relationship was between the two companies at that time?

A. No. I had no way of knowing.

Q. It is entirely possible, isn't it, that you may have said something about the relationship, which you thought may have been the relationship between the two companies at that time?

A. As I remember it, since the mail and everything was handled through the same office, I think I made mention to him that the bills should be submitted to the same channels. What he made out of that, I don't know, but as far as what I—the contract I had with Tucson 130 miles away, our payrolls et cetera went through the same channels.

Q. But the point is you did not then know what the situation was between the two companies, isn't that true?

A. I know that I drew my check or was drawing my check from Construction Materials, Construction Division.

Q. Isn't it true at that time you did not know exactly the relationship between those two companies? [226]

A. No, I don't—I don't think I know anything of the Company policy even to this date.

Q. That would be more true then than today, isn't that correct?

A. The only thing I know about the people are the ones that hire me and the ones I work for.

Q. Isn't that true that you knew less about the relationship between those two companies than you do now?

A. I don't know anything of the relationship now.

Q. It is entirely possible you may have said something that caused Mr. Negley to jot down the notation he did about your conversation?

A. I am not denying. He could have.

From looking at the entire examination, it is quite obvious that question No. 2 and the answer thereto is to all intents and purposes the same as question No. 7 and the answer thereto. Taken alone, as quoted in the statement of facts submitted by the appellant, Mr. Swagerty's answer to question No. 7 would appear to be something other than it was.

The only testimony that such a statement was made is that of witness for the appellant, Paul Negley, and a portion of plaintiff Apache Powder Company's Exhibit No. 3, being a pencilled memorandum made by the witness, Paul Negley (R 280). There being a conflict in evidence as to this point the court having heard the case, sitting without a jury, it is the sole trier of this fact.

ANSWER TO ARGUMENT I

An analysis of appellant's Argument I would appear to be that regardless of how many subcontractors a supplier supplied materials to on a given government project, that the required 90 day notice would be determined from the last of the materials furnished to all or any of the subcontractors and not from that furnished the particular subcontractor who remained indebted to the supplier. Thus, if a supplier furnished supplies on a given government project to subcontractor A in June, July and August of 1956, and no materials to him thereafter and to subcontractor B in September, October and November of 1956 and no materials thereafter and to subcontractor C in December, 1956, January and February, 1957, and was fully paid by

subcontractors B and C and was not fully paid by subcontractor A, appellant's theory would apparently be that a notice to the prime contractor given any time prior to June 1, 1957, would suffice to hold the prime contractor and his bonding company on the indebtedness owed by subcontractor A even though it was nine months overdue and not merely 90 days. This appears to the appellees to be a very novel interpretation of Section 270b(a) and one apparently which has not been advanced in any other reported cases.

The object of this section, including as it does the 90 day notice provision, is obviously twofold in nature. It is broadly for the protection of suppliers furnishing materials and supplies on government projects and also containing as it does a provision for the 90 day notice from the supplier to the prime contractor it has a further purpose of providing a method in which the prime contractor can protect against double payments on the account of defaulting subcontractors. As is stated in *United States, ex rel, Hargis v. Maryland Casualty,* D.C. Cal. 1946, 64 F. Supp. 522:

> "In requiring that written notice of claim be given to the contractor, and not to the bonding company, within a definite time, the statute seeks to protect the contractor by making it possible for him to withhold moneys due to the subcontractor, in order to satisfy claims asserted by third persons."

See also *Bowden, et al, v. United States of America for the Use of Malloy, supra.*

The appellant in its brief at page 25 states the following in an interpretation of the statute in question:

> "In the latter case it is required that the supplier give notice of his claim against the subcontractor to the prime contractor, within 90 days from the date on which said supplier *furnished the last of the material*

for which the claim is made." (Emphasis supplied by appellant.)

Appellant argues that the written notice of claim submitted by it on April 25, 1957, was in fact a claim for materials furnished by it on the job the last of which were furnished on March 12, 1957, and that all payments received by it from Construction Materials Company were rightfully applied by appellant to the whole indebtedness owing to it for materials supplied to the Ajo job, and not to the last of the materials which were actually furnished to Construction Materials Company. Unfortunately the facts and the law do not bear out the appellant in this argument. From June 13, 1956, to November 1, 1956, the appellant furnished supplies and materials on the job in question to a value of $29,900.39 (R 295). These materials were admittedly furnished to Pioneer Constructors. From November 1, 1956, to March 12, 1957, the appellant furnished additional materials and supplies to the job in question of a value of $12,553.02 (R 295). On December 29, 1956, it received the check of Construction Materials Company in the sum of $4,723.37 with remittance instructions that the same was in payment of itemized invoices (Appellant's Exhibit No. 11a in evidence; R 284). On February 13, 1957, it received an additional payment from Construction Materials Company in the amount of $3,417.74, likewise with instructions that the same was in payment of itemized invoices (Appellant's Exhibit No. 11b in evidence; R 284). And on April 12, 1957, it received an additional payment from Construction Materials Company in the amount of $4,411.91, likewise with instructions that the same was in payment of itemized invoices (Appellant's Exhibit No. 11c in evidence). The total of these three payments is the sum of $12,553.02 and constituted payment of all supplies and materials furnished by appellant on the job in question after November 1, 1956.

There are two things which conclusively refute appellant's assertion that it applied these payments against the whole of the account and not to the itemized invoices mentioned: 1) The chronological breakdown of the account as furnished to the attorney for appellees by appellant (Defendant, Ashton Company, Inc., Exhibit A in evidence (R 294) and defendant Ashton Company, Inc., Exhibit B in evidence (R 295-296-297)) which shows that the payments were applied against the invoices as instructed; and 2) the law as to the application of payments received where directions are given as to the application of the funds by the person making the payment. As is stated in the case of *Cameron v. Sisson,* 74 Arizona 226 at pages 230 and 231, 246 P.2d 189:

> "The well settled rule is that where payment is given to a creditor on more than one account by his debtor, he may direct to which account he desires a particular payment to apply, but if at the time of paying the money he fails to make any such direction, the creditor has the right to apply the payment as he sees fit."

See also *Webb v. Crane Co.,* 52 Ariz. 299, 80 P.2d 698. *Valley National Bank v. Shumway,* 63 Ariz. 490, 163 P.2d 676. In the case of *Mumm v. Taylor,* 213 P.2d 836, the court stated in adopting and quoting from 39 Am. Jur. Sec. 110, page 792, as follows:

> "It is a well settled principle of both the civil and the common law, which is universally applied, that a debtor owing more than one debt to a creditor or a debt composed of several items has the right to direct to which debt or debts or to which item of a single debt and in what amounts a payment made by him shall be applied. The reason for this rule is that up to the time of payment the money is the property of the debtor, and being such may be applied as he sees fit. If a debtor directs the application of a payment, the duty is there-

> by imposed on the creditor, regardless of whether he does or does not agree or consent to the debtor's request, to apply the money as directed, or return it to the debtor, and if he fails to return it, it is regarded by law as having been applied as directed, no matter how the creditor in fact applied it, unless the improper application is subsequently ratified by the debtor. Thus it has been held that where, pending the adjustment of a disputed liability, the debtor sends his creditor money as a payment in full of the demand, it is the duty of the creditor to accept the money for the purpose for which it was offered, or to return it, and his refusal to return it will be deemed an election to accept it for the purpose offered."

Thus it can be seen that even if the appellant had not applied the payments received from Construction Materials Company in the way directed, they were bound, because of such direction, so to apply the payments or to return the money to Construction Materials Company. This, of course, they did not do.

At the time of giving the written notice in an attempt to comply with the statute on April 25, 1957, the appellant had thus been paid in full for all materials furnished after November 1, 1956, and its claim therefore was for materials, the last of which were furnished prior to November 1, 1956. Its notice of claim, therefore, even under the ingenius theory propounded by the appellant was not made within 90 days *from the date on which said supplier furnished the last of the materials for which the claim is made.*

APPELLEES' ANSWER TO APPELLANT'S ARGUMENTS II, III AND IV

These divisions of the appellant's arguments deal primarily with the question of whether the appellant, Apache Powder Company, had notice or knowledge of the fact that

Pioneer Constructors was no longer performing work on the Ajo job and that the party to whom they furnished materials and supplies was a separate distinct corporation, namely, Construction Materials Company, and whether the information it had was sufficient to put it on inquiry, and if so, was a diligent inquiry made. Much of the space taken up by the appellant in its brief for argument under these subsections deals with evidentiary matter and also what findings of fact were made by the lower court. It is well at this time and prior to getting into the arguments proper, for the appellees to point out certain discrepancies in the facts as set forth by appellant and the facts as found by the lower court and the actual testimony as appears in the record of the trial.

1. On page 28 and again on page 29 of appellant's brief the statement is made with reference to the record that the appellee, Ashton-Mardian Company, required that the work proceed under same management with the same personnel and equipment as under Pioneer Constructors' subcontract. This is directly contrary to the evidence. The actual question and the answer given by the witness Harold Ashton and which is cited by the appellant as substantiating this assertion is as follows (R 132):

> "Q. You were also questioned in regard to change in management, personnel, equipment and suppliers on this job after November 1, 1956. I believe you said there was no material change not due to change in the type of work performed. Was that a condition of your agreement with Skorpick and Moore to give them the subcontract to Construction Materials, a condition that the work proceed by the same management, personnel, equipment?
>
> A. That wasn't a condition."

2. Throughout the arguments II, III and IV appears the statement, alleged as a fact, that the appellant, Apache Powder Company, was informed that Construction Materials Company, Construction Division, was a division of Pioneer Constructors. It might be well to review the evidence upon which this assertion is made. The only witness to testify that this statement was made to him was witness Paul Negley, whose testimony appears on pages 242-243, Transcript of Record, together with the pencilled notations made by Mr. Negley and constituting a portion of Apache Powder Company's Exhibit No. 3 in evidence (R 280). The position of the notations on the pencilled slip and the added computations obviously made after the telephone call in question from Paul Swagerty are of themselves of interest and were probably of great value to the lower court in determining this particular fact. Against the testimony of Mr. Negley, there is, in addition to the physical makeup of the notations above mentioned, the direct testimony of Paul Swagerty denying they were so informed (R 249 to R 260).

The findings of fact of the lower court (R 66 to R 75) and in particular findings No. 12 and 16 (R 70-71-72) show the court did not find as a fact that Apache Powder Company was so informed and in fact the only conclusion to be drawn from said findings is that the court actually found that they were not so informed. Rule 52a of the Federal Rules of Civil Procedure, 28 USCA 13, provides "Findings of fact should not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

This court in the case of *Carr v. Yokohama Specialty Bank, Limited, of San Francisco,* C.C.A. Cal. 1953 9th Cir., 200 F.2d 251 in dealing with this section of the rule has held that where evidence is conflicting, trial court has the duty to apprise all facts, adduce the proof and it is not clearly

erroneous for the court to choose between two permissible and conflicting views as to the weight of the evidence and appellate court may not dispute such a choice by the trier of facts.

3. It should be pointed out that in appellant's argument No. II a great deal of emphasis is given to the admitted fact that the two subcontracts involved, that to Pioneer Constructors, which was terminated as of November 1, 1956, and that to Construction Materials Company, which originated as of November 1, 1956, concerned the same items of work, the only difference being the difference in quantities to be performed or supplied. The appellant, however, had no knowledge of the contents of the contract with Pioneer Constructors until long after the present controversy had jelled (R 218-219). No logical reason is advanced by appellant, nor can the appellees find any, why this fact would render the rights of the parties hereto any different than had the Construction Materials Company subcontract called for more, less or different work.

Because the arguments under subsections II, III and IV of appellant's brief deal primarily with notice or knowledge, it would be well to review at this time what actual information, notice or knowledge appellant had as to the identity of the subcontractor with whom it was actually dealing, at least after December 3, 1956. (Appellant had no direct contractual relations either express or implied with the appellee Ashton-Mardian Company (R 73-74).)

1. On December 4, 1956, appellant received a telephone call from Paul Swagerty, the person with whom they had had almost exclusive contact in the sale and shipment of their supplies and materials on this job, (R 239) in which it was informed that the balance of the blasting materials and supplies to be sent to the Ajo job were to be billed

to Construction Materials Company, Construction Division (R 251-252, R 243, R 280-281). The original pencilled order notes taken by Mr. Negley (R 280-281) were set up in accordance with this information and request and later changed by instructions from Mr. Henderson, General Manager of the company (R 280-R 282).

2. On or about December 10, 1956, it received a call from Melvin J. Simmons in which he explained to the appellant that "powder being sent to the Ajo job should be billed to Construction Materials because they were doing the work" (R 166). Receipt of this telephone call was denied by the appellant but stands as conflicting testimony on this point.

3. On December 29, 1956, appellant, Apache Powder Company, received the check of Construction Materials Company in the amount of $4,723.37 in payment of individual invoices billed by appellant to Pioneer Constructors (R 284).

Also to be considered in evaluating the notice and knowledge of appellant, Apache Powder Company, to the change in the subcontractor to whom they were supplying materials is the prior knowledge of the General Manager of appellant, Robert L. Henderson, of the existence of Construction Materials Company, not, as asserted, a division of Pioneer Constructors, but as an affiliated company (R 226-227).

Based on the above facts, the lower court made its findings of facts Nos. 12, 14, 15, 16 and 17 (R 70-71-72). The general rule as to circumstances of this kind is found in 39 Am. Jur., Section 12, page 238, as follows:

> "12. Means of Knowledge as Notice.—Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him. When a

party has information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth, to a knowledge of the interest, claim or right which really exists, then the party is absolutely charged with a constructive notice of such interest, claim, or right. In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice, he does wrong not to heed the 'signs and signals' seen by him. It will not do to remain wilfully ignorant of a thing readily ascertainable, and it is no excuse for failure to make an inquiry, that if made, it might have failed to develop the truth. It has been said that want of actual knowledge in such a case is a species of fraud."

Further in 39 Am. Jur., page 241, Section 15, the following is stated:

"15. Nature of Facts Exciting Inquiry.—Notice of facts putting one on inquiry is notice of the facts which such inquiry would have revealed. It is impossible, however, to lay down a general rule by which to determine what facts are sufficient to excite inquiry. Each case must, to a great extent, be decided on its own facts. It has been said that notice sufficient to put a person on inquiry need not contain complete information on every fact material to his knowledge. To charge one with notice, however, the facts must be such

as ordinarily to excite inquiry with reference to the particular fact which the inquiry is designed to elicit."

In light of the foregoing quotations, it is well to review the situation from the appellant's position at the time it received each of the above mentioned items of information, notice or knowledge. On December 4, 1956, the appellant had been supplying to Pioneer Constructors blasting materials and supplies from June 13, 1956 on an open account basis under terms requiring payment in cash in 30 days after delivery (R 218). It had received no payments whatsoever on this account (R 220 and R 294). On December 4, 1956, it received an order from a different corporation, Construction Materials Company, with the information that the balance of the job should be billed to the second corporation (R 252). On or about December 10, 1956, when the telephone call from Melvin J. Simmons was received it had within its knowledge all of the above named facts together with the added impetus of the information contained in Mr. Simmons' telephone call. On December 29, 1956, it had all of the aforementioned information together with the added fact that the second corporation, Construction Materials Company, was actually paying for materials and supplies furnished to the Ajo job and that such payments were being made on an invoice payment basis and not as a payment on account for all of the materials and supplies furnished on the job.

Let us now examine what the appellant did with this information and also what information it could have elicited by the simple means of one telephone call, one letter or one conversation with a representative of either Pioneer Constructors, Construction Materials Company or Ashton-Mardian Company.

Mr. Henderson, General Manager of the appellant, stated that all that he did was consider the matter, discuss the

situation with his accounting department and also have his representatives in the field see if the job was progressing without interruption (R 234). Apparently even the representatives in the field did not see fit to make any inquiry whatsoever of the people on the job doing the type of work which had formerly been performed by Pioneer Constructors. No further inquiry was even made of Paul A. Swagerty (R 256).

If Mr. Henderson or any other representative or employee of the appellant had seen fit to make one of the telephone calls or write one of the letters or contact one of the parties above suggested, he and the appellant would have found out that all materials which it furnished to the Ajo job, at least after December 4, 1956, had been ordered by Construction Materials Company, received by Construction Materials Company and used by Construction Materials Company and that the defendant, Pioneer Constructors, had not ordered or received or used any of the materials furnished by appellant, at least since December 4, 1956, and that as a matter of fact Pioneer Constructors had ceased to do any work on the Ajo job after October 31, 1956 and that all work done on the job thereafter was being performed by Construction Materials Company. It is the appellees' position that the knowledge, information and notice in the possession of the appellant was sufficient under the law to put it on inquiry as to the details of the change-over in customers on the Ajo job and that the acts taken by them in making inquiry were not sufficient to relieve them of their duty to ascertain the true facts.

It should be noted that the appellant, Apache Powder Company, admitted that the information which it had received was sufficient to make it give consideration to its future course of dealing on the Ajo job (R 230). The true

question then is not whether the appellant, Apache Powder Company, had sufficient information or notice to put it on inquiry, because it is admitted that it did give the matter consideration and made an investigation of sorts, but whether it used due diligence in making its inquiry. The appellees submit that it did not and the District Court so found (R 72).

The rule with respect to the duty to make inquiry is well stated in 66 C.J.S., Notice, Section 11b (2) page 645, as follows:

> "When a person has notice of circumstances which put him upon inquiry, and he actually makes due inquiry into the circumstances and either fails to discover the existence of any rights in conflict with his own or becomes satisfied that the suspicions which have been awakened are unwarranted, or that a change in the circumstances has obviated the grounds of his apprehension, he is to be regarded as having acted bona fide and without notice of the fact."

The lower court found as a fact that appellant, Apache Powder Company, did not act with ordinary prudence in making an investigation under the circumstances. In the case of *Reconstruction Finance Corporation v. Cody Finance Co.,* C.C.A. 10th Cir., 214 F.2d 695, the court, in commenting on the findings of the lower court that a bona fide inquiry had been made, stated:

> "Whether the finance company made a bona fide inquiry, assuming a duty rested upon it to make such an inquiry, presented an issue of fact to be determined from all the facts and circumstances before the trial court. As stated, we think the facts as outlined sufficiently support the court's findings and conclusions of law and the judgment based thereon and under the well established rule of this court such findings and conclu-

sions will not be disturbed on appeal, unless clearly erroneous."

The court cites as authorities the following cases:

Mitton v. Granite State Fire Insurance Company, C.C.A. 10th Circuit, 196 F.2d 1998;

Jones v. Grinnel, C.C.A. 10th Circuit, 179 F.2d 873;

Wyoming Railroad Company v. Harrington, C.C.A. 10th Circuit, 163 F.2d 1004.

A very interesting argument is advanced by the appellant at the top of page 39 of its brief when it is stated as follows:

"In connection with the information that it was a division of Pioneer Constructors, the very name Construction Materials Company, Construction Division, indicated that the organization was a division of some larger corporation * * *"

The very same argument could be advanced that the name General Motors Corporation, Buick Division, would indicate that General Motors Corporation was a division of some larger organization.

ANSWER TO ARGUMENT V

Suffice it to say that the cases cited by the appellant in this argument are without doubt the law on the subject insofar at least as they authorize a liberal construction of the statute. Appellees point out, however, that the purposes and objects of the act are twofold in nature and not entirely onesided, as the quotes in the appellant's brief would indicate. This fact was well stated by this court in the case of *Bowden, et al. v. United States of America for the Use of Malloy,* supra, where the court stated as follows:

"It cannot be doubted that one purpose of Congress in enacting the Miller Act was the protection of laborers

and materialmen. But it is clear too, we think, from the mechanics provided in the Act for its operation and the accomplishment of its purpose, that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor."

ANSWER TO ARGUMENT VI

In Argument VI appellant is urging the court to overrule its own decision in the case of *Bowden, et al. v. United States of America for the Use of Malloy,* supra, and follow the earlier decision of the Fifth Circuit in the case of *Houston Fire and Casualty Insurance Company v. United States for the Use of Trane Company,* C.C.A. 5th Cir., 1954, 217 F.2d 729, and hold that the provisions of the Miller Act which require a supplier to a subcontractor to give written notice to the prime contractor are meaningless and permit recovery on satisfactory proof of oral notice.

The question involved under this division of appellant's argument is actually twofold in nature and appellees believe it can be best stated as follows:

1. As is stated by appellant: "In any event is specific and unquestioned oral notice given by a supplier to the prime contractor of the supplier's claims against the subcontractor sufficient notice under the Miller Act if such notice is given within 90 days after the delivery of the last of the materials to the subcontractor?" and

2. If oral notice is held by this court to constitute compliance with the statute then was the oral notice in this case given by the appellant, Apache Powder Company, to the appellee, Ashton-Mardian Company, on March 19, 1957, given within the time limit as prescribed by the statute?

Appellees submit that the answer to both of the foregoing questions is no.

No language could be more specific and definite than that of the Miller Act which requires "giving written notice to said contractor within ninety days * * *". While it is true that the Miller Act is remedial in nature and as such should be liberally construed, and that Federal courts on numerous occasions have upheld liberal construction of the Miller Act, we can find only one case, namely, *Houston Fire and Casualty Insurance Company v. United States for the Use of Trane Company*, supra, in which a court went so far as to hold that the requirement of written notice could be dispensed with provided oral notice could be satisfactorily proved. If this case is carried to its logical conclusion it would dispense with any writing whatsoever since, although it involved a subsequent writing, its reasoning is that satisfactory proof that oral notice was brought home to the principal contractor is sufficient.

It is interesting to note that the Court of Appeals for the Fifth Circuit itself apparently had serious doubts as to the soundness of this conclusion since the Court stated:

> "It is true that the statute is carefully and meticulously phrased, and if this were a matter of first impression we might find difficulty in coming at once to the conclusion that what was done in this case was a sufficient compliance with it. However, the decisions under the statute, and particularly Coffee v. United States for the Use and Benefit of Gordon, supra, (157 F2d 968) have made it clear that it was."

We believe that the court misconstrued the *Coffee* case since as we read that decision and as this court construed the *Coffee* decision in the *Bowden* case, supra, the *Coffee* case did not hold that written notice to the prime contractor was unnecessary.

With the decision of the Fifth Circuit before it this court squarely held in *Bowden, et al. v. United States of America for the Use of Malloy*, supra, that written notice is necessary, the court stating:

> "The appellee asserts, correctly enough, that the Miller Act is remedial in nature and entitled to a liberal construction in order to effectuate the legislative intent to protect those whose labor and materials go into public projects. He then argues that since the letter from Hickey gave the prime contractor all the information which it would have obtained if Malloy had given it the written notice provided by the statute, the principle of 'liberal construction' requires that we hold the latter notice was unnecessary. But this argument goes too far, too fast. It overlooks entirely the fact that the statute makes the requirement of written notice from the supplier a condition precedent to a right of action on the bond; and no rule of liberality in construction can justify reading out of the statute the very condition which Congress laid down as prerequisite to the cause of action."

The court further stated in Note 10 thereto:

> "We are aware that Houston Fire and Casualty Insurance Co. v. United States for Use and Benefit of Trane Company, 5 Cir., 1954, 217 F2d 727 is contra, but we do not consider the case soundly decided and, accordingly, do not follow it."

The facts in the *Houston* case were that oral notice was given and a written acknowledgment thereto was made. In the *Bowden* case the claimant on numerous occasions notified the prime contractor of the claim and numerous conferences were held in attempts to obtain payment, and the defaulting subcontractor had given a letter in writing to the prime contractor setting forth the details. It would

appear that under the doctrine of the *Houston Fire and Casualty Insurance Company* case the latter writing would have been sufficient combined with the undisputed proof of the oral notice but as this court stated that while the Fifth Circuit decision was contra, this Court did not choose to follow it.

We respectfully submit that the reasoning in the *Bowden* case is much sounder than that in the *Houston* case. The latter, it would appear, carried the doctrine of liberal construction to unjustified limits by completely reading out of the statute the requirement for written notice to the extent that the court rendering the opinion, itself expressed doubts as to its soundness. This court, on the contrary, considered the question squarely, reached the logical conclusion that the statute meant what it said and refused to follow the other case.

In the present case there was no writing of any kind from the appellant, Apache Powder Company, to the appellee, Ashton-Mardian Company, given with the intent that the same should constitute notice under the Miller Act prior to April 25, 1957. It is interesting to note that there was a writing originating from the appellant to the attorney for the appellees on April 12, 1957, which letter is printed in full in the record at pages 295-296-297 and 298 and which could have probably constituted notice if given timely, under the Miller Act, except for the last paragraph therein which is as follows:

> "If we determine that the shipment of March 12, 1957 will be the last to be made on the subcontract, we will in due time make formal claim under the Federal Statutes against you as the general contractors with copies to your bonding companies and to U. S. Army Corps of Engineers."

It is interesting to note that the appellant did not deem the same as constituting notice under the Miller Act and now attempts to satisfy the statute with an oral notice even previous to the letter of April the 12th. Can appellant state, "This writing is not a notice under the Miller Act and, we will subsequently give you notice." and then at a subsequent date contend that notice under the act had been previously given? Appellees submit that they cannot.

Question No. 2: "If oral notice is held by this court to constitute compliance with the statute then was the oral notice in this case given by the appellant, Apache Powder Company, to the appellee, Ashton-Mardian Company, on March 19, 1957, given within the time limited as prescribed by the statute?". Let us analyze the evidence and law as to whether a notice of March 19, 1957 is within the time limited by Section 270b(a). The evidence shows that from and after November 4, 1956, Construction Materials Company did in fact perform all the labor on the Ajo job for which supplies from the appellant were furnished and Pioneer Constructors did in fact cease to do any work on the job after October 31, 1956 (R 157). The evidence further discloses that the appellant received sufficient information and notice to put it on inquiry as to the true identity of its customer on the Ajo job on December 4, 1956. The question then arises, assuming that the information received by the appellant on December 4, 1956, was not sufficient to constitute notice to them of the true fact situation but was sufficient to put them on inquiry as to the true fact situation, how long should the appellant be allowed to make such inquiry in an attempt to ascertain the true facts before being deemed to have notice. The rule with respect to this time element is set forth in 66 C.J.S., *Notice,* Section 11b (3), page 645, as follows:

> "A person put on inquiry by facts is to be allowed a reasonable time in which to make such inquiry before being affected with notice. Neither law nor equity will impute to a person a knowledge of facts which he has not had a reasonable opportunity to ascertain. What constitutes a sufficient lapse of time for notice depends on the circumstances of the case. If one takes but a short time for pursuing his inquiries, he cannot afterward avoid the effect of the notice by claiming that he did not allow himself a reasonable time for investigation."

As has been pointed out in previous argument all that would have been required of the appellant to learn the true fact situation would have been a direct inquiry to either the appellee, Ashton-Mardian Company, or to Pioneer Constructors or Construction Materials Company, none of which was done. Would a reasonable time in which to make such inquiry be one day? One week? Ten days? The appellees submit that no longer period than ten days should be allowed under the circumstances, in which case the appellant should be bound as being affected with the notice no later than December 14, 1956. A notice of any kind given on March 19, 1957 thus does not fall within the required 90 day period.

The appellant would have this court hold that the 90 day period in which it is mandatory upon the supplier to give notice to the prime contractor should, in this instance, be from a delivery made by the appellant on December 20, 1956. Appellees submit that this is not and should not be the law. The evidence shows that the lower court found that the last of the materials and supplies furnished to the defaulting subcontractor, Pioneer Constructors, and used by it was delivered prior to November 4, 1956, and in any event, prior to December 4, 1956. In accordance with the

provisions of the Miller Act, claim must be submitted within 90 days from "* * * the date on which such person did or performed the last of the labor and furnished or supplied the last of the material for which such claim is made, * * *". The theory adopted by the lower court in the trial of this action and as expressed by the court is set forth at pages 193 to 195 of the Transcript of Record. Assuming for the purposes of this argument that this theory is a proper one, does it follow that lack of notice as to the change of the actual identity of the customer of the appellant extends the period of claim for a full 90 day period after such notice? Appellees submit that it does not. Appellees further submit that the most that this fact situation should do is to permit the supplier to submit his claim within a reasonable time after the receipt of such notice and within 90 days from the date on which the last of the supplies were furnished and if, and only if, such reasonable time allowed will extend the 90 day period should such period be extended.

Inasmuch as the method of making claim is so simple a matter under the Miller Act, it would appear that 30 days would be ample allowance. The time limit under this theory would thus expire on February 1st, or at the latest, March 4, 1956 (R 71-72). No notice of any kind, either written or oral, was sent by the appellant to the appellees prior to this date.

The court should not lose sight of the fact, as stated in the early part of this argument, that without question the party ordering, receiving and using the materials and supplies supplied by the appellant, at least on and after December 4, 1956, was Construction Materials Company and not Pioneer Constructors.

CONCLUSION

Appellees respectfully submit that under the evidence and law applicable thereto, the appellant did not comply with the conditions precedent to a right of action against the appellees under Act of Congress of August 24, 1935, c. 642 §§ 1, 2, 49 Stat. 793, 794, 40 U.S.C.A. §§ 270a, 270b, and thus is not entitled to recover as against them.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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